No. 93-388

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

COMMONWEALTH OF PENNSYLVANIA, OFFICE OF THE BUDGET,

Petitioner,

vs.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ALMA R. JACOBS, REGIONAL DIRECTOR, REGION III, DHHS,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred as a matter of law by ignoring the express statutory language of the Intergovernmental Cooperation Act, 31 U.S.C. § 6503(a), as drafted by Congress, and holding the Commonwealth of Pennsylvania accountable for interest earned on funds held in self-insurance reserve accounts pending disbursement to claimants when Congress has expressly stated "a State is not accountable for interest earned on grant money pending its disbursement for program purposes."

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Contents	ii
Table of Citations	iii
Opinions Below	1
Statement of Jurisdiction	1
Statute Involved	1
Statement of the Case	2
Reasons for Granting the Writ	4
THE COURT OF APPEALS' DECISION CONSTITUTES JUDICIAL LEGISLATION THAT RE-WRITES THE EXPRESS INTENT OF CONGRESS WHICH WILL ADVERSELY AFFECT THE COMMONWEALTH OF PENNSYLVANIA AND TWENTY-SIX OTHER STATES WITH SELF-INSURANCE RESERVES.	4
A. The Court Of Appeals' Interpretation Of The ICA Is Contrary To The Act's Plain Meaning.	8
B. Even If The ICA Were Ambiguous, Which It Is Not, The Court Of Appeals Erred By Misinterpreting The Legislative History Of The ICA.	14

Contents

Page

Conclusion 16

TABLE OF CITATIONS

Cases Cited:

American Tobacco Co. v. Patterson, 456 U.S. 63 (1982) . 11

Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) 8

Caminetti v. United States, 242 U.S. 470 (1919) 9

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 5

Commissioner of Internal Revenue Service v. Asphalt Products Co., Inc., 482 U.S. 117 (1987) 5, 6, 7, 8

Consumer Product Safety Commission v. FTE Sylvania, Inc., 477 U.S. 102 (1980) 11

Demarest v. Manspeaker, 498 U.S. 184 (1991) 5, 6

Garcia v. United States, 469 U.S. 70 (1984) 11

Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982) 8, 9, 10

Malloy v. Eichler, 860 F.2d 1179 (3d Cir. 1988) 11

Contents

Page

Norfolk and Western Railway Co. v. American Train Dispatchers Assoc., 499 U.S. 117, 111 S. Ct. 1156, 113 L. Ed. 2d 95 (1991) 5, 8, 11

Southeastern Community College v. Davis, 442 U.S. 397 (1979) 5, 8

United States v. American Trucking Association, Inc., 310 U.S. 534 (1940) 8

United States v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989) 9, 11

Statutes Cited:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 2

31 U.S.C. § 6501 *et seq.* 1

31 U.S.C. § 6503(a) ..... i, 1, 2, 4, 7, 11, 12, 14

Rules Cited:

Supreme Court Rule 10.1 4

Supreme Court Rule 10.1(c) 4

Contents

Page

Other Authority Cited:

H.R. Conf. Rep. No. 1934, 90th Cong., 2d Sess. 12, reprinted in 1968 U.S.C.C.A.N. 4248 14

APPENDIX

Appendix A — Judgment of the United States Court of Appeals for the Third Circuit Dated June 11, 1993 .... 1a

Appendix B — Opinion of the United States Court of Appeals for the Third Circuit Filed June 11, 1993 .... 3a

Appendix C — Order and Judgment, and Memorandum of the United States District Court for the Middle District of Pennsylvania Filed May 18, 1992 ..... 25a

Appendix D — Sur Petition for Rehearing of the United States Court of Appeals for the Third Circuit Dated July 9, 1993 ..... 44a

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit is reported at 1993 U.S. App. LEXIS 13616 (3d Cir. June 11, 1993) and is reprinted in the Appendix at la-24a. The Opinion of the United States District Court for the Middle District of Pennsylvania is not reported, but is reprinted in the Appendix at 25a-43a.

STATEMENT OF JURISDICTION

Petitioner seeks this Court's review of a decision by the Court of Appeals reversing an Order of the district court granting summary judgment in favor of the Commonwealth. The Court of Appeals reversed the decision of the district court on June 11, 1993. The Commonwealth petitioned the Court of Appeals for Rehearing or Rehearing *En Banc* on June 25, 1993. The Court of Appeals denied the Commonwealth's Petition for Rehearing or Rehearing *En Banc* on July 9, 1993. *See* 44a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Intergovernmental Cooperation Act, 31 U.S.C. § 6501 *et seq.*, is at issue in this case. Specifically, Section 203(a) of the ICA (31 U.S.C. § 6503(a)) provides:

> Consistent with program purposes and regulations of the Secretary of the Treasury, the head of an executive agency carrying out a grant program shall schedule the transfer of grant money to minimize the time elapsing between transfer of the money from the Treasury and the disbursement by a State, whether disbursement occurs before or after

the transfer. A State is not accountable for interest earned on grant money pending its disbursement for program purposes.

STATEMENT OF THE CASE

The Commonwealth brought this action against the Department of Health and Human Services ("DHHS"), Departmental Appeals Board ("DAB") to establish that it is not accountable for interest earned on federal grant funds for self-insurance reserves used to pay workers' compensation and health benefit claims by state employees who administered federally funded programs. The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331. The district court entered summary judgment for the Commonwealth, holding that under the express statutory language of the Intergovernmental Cooperation Act ("ICA"), 31 U.S.C. § 6503(a) (1988) (amended 1990), the Commonwealth was not accountable for interest earned on federal funds held pending disbursement for program purposes.

The federal government provides certain funds and grants to the states, including the Commonwealth, through various programs. DHHS is the federal agency responsible for negotiation, approval, and auditing of the method by which these funds are allocated. The Commonwealth receives a variety of federal funds, including grant funds, as reimbursement to the Commonwealth for its share of the employee costs incurred when state employees work on federal projects.

Instead of purchasing insurance to cover state workers' compensation and health benefit claims, the Commonwealth, with the approval of DHHS, self-insures its own employees. This self-insurance program utilizes actuarially calculated reserves for anticipated claims. This program is expressly allowed by federal regulation. The reserves are retained within the Commonwealth's General Fund with specific accounting maintained.

In 1988 and 1989, the Director of Cost Allocation ("DCA") of DHHS audited the Commonwealth's cost allocation plan regarding the federal funds contributed to the Commonwealth and demanded that the Commonwealth pay millions of dollars to the federal government for the purported federal share of interest that DHHS claimed the Commonwealth allegedly earned during fiscal years 1988 and 1989. In accordance with available administrative remedies, the Commonwealth requested that the DHHS Regional Director review the findings of the DCA. The Regional Director accepted the findings of the DCA and demanded the payment of "interest" that purportedly accrued on the insurance reserves pending disbursement for actual claims made.

The Commonwealth appealed the Regional Director's decision to the DAB of DHHS. The DAB, reviewing its own Regional Director's decision, affirmed the decision of the Regional Director that the Commonwealth was required to pay interest allegedly earned on the self-insurance reserves for fiscal years 1988 and 1989.

The Commonwealth's action in the district court sought a declaratory judgment that it was not required to pay the interest to the federal government, as well as an injunction prohibiting DHHS from recapturing such interest. Holding that the plain language of the ICA is unambiguous and thus dispositive of the issues, the district court concluded that funds held in the Commonwealth's self-insurance accounts were held "pending disbursement for program purposes." Accordingly, the Commonwealth was held not to be accountable for interest earned on those funds.

DHHS appealed the decision of the district court. On review, a divided panel of the Third Circuit reversed the district court, finding instead that because the Commonwealth had posited an alternative theory under which it would also prevail, the ICA is ambiguous. The majority then reinterpreted the language of the

ICA which clearly provides that "A State is not accountable for interest earned on grant money pending its disbursement for program purposes." The majority held that Congress "intended" to collect interest if the funds were not "promptly" disbursed. (*See* 12a-13a).

Despite the clear language of the ICA, the majority found that this statutory provision "was intended to have a specific and limited meaning" (*see* 12a) and applied a rule which, even as the majority admits, "predates the enactment of Section 203(a)" [31 U.S.C. § 6503(a)] (*see* 13a). Applying this faulty analysis, the majority reversed the order of the district court.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS' DECISION CONSTITUTES JUDICIAL LEGISLATION THAT RE-WRITES THE EXPRESS INTENT OF CONGRESS WHICH WILL ADVERSELY AFFECT THE COMMONWEALTH OF PENNSYLVANIA AND TWENTY-SIX OTHER STATES WITH SELF-INSURANCE RESERVES.

This Court may grant a petition for a writ of certiorari where there are "special and important reasons therefor." *See* Supreme Court Rule 10.1. Factors considered in granting certiorari include whether a Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court or where a Court of Appeals has decided a federal question in a way that conflicts with applicable decisions of this Court. *See* Supreme Court Rule 10.1(c).

In this case, the Court of Appeals has erroneously interpreted the ICA in contravention of its plain and unambiguous language. In support of its interpretation, the Court of Appeals resorts to selected excerpts from the legislative history of the ICA which it uses to effectively re-write the statute.

The Court of Appeals' construction of the ICA is contrary to the law of this Court which has consistently adhered to the principal that " If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Norfolk and Western Railway Co. v. American Train Dispatchers Assoc.*, 499 U.S. 117, 111 S. Ct. 1156, 113 L. Ed. 2d 95, 106 (1991) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984)); *see also, Commissioner of Internal Revenue Service v. Asphalt Products Co., Inc.*, 482 U.S. 117, 120-121 (1987).

This Court has granted certiorari to review statutory interpretations of the Courts of Appeals which are contrary to the plain language of federal statutes. *See Southeastern Community College v. Davis*, 442 U.S. 397, 404 (1979) (Court granted certiorari to review Fourth Circuit's interpretation of section 504 of the Rehabilitation Act of 1973 because of that section's importance to "the many institutions covered by § 504"); *Demarest v. Manspeaker*, 498 U.S. 184 (1991) (Court granted certiorari to review federal statute pertaining to witness fees and Tenth Circuit's holding that although language of statute was "unqualified", other evidence revealed that Congress did not intend to permit prisoner witnesses to receive witness fees); *Commissioner of Internal Revenue Service v. Asphalt Products Co., Inc.*, 482 U.S. at 120 (Court granted certiorari to review Sixth Circuit's construction of tax statute which was in conflict with another circuit and "in obvious conflict with the plain language of the statute").

In *Demarest v. Manspeaker*, the Tenth Circuit affirmed a district court's holding that a federal statute providing for witness fees did not apply to a prisoner who testified as a witness in a federal criminal trial. Although the Tenth Circuit found the language of the statute to be "unqualified", it nonetheless found

that the statute did not apply to prisoners based on an administrative construction of the statute, two other court decisions addressing the same statute, and Congress' revision to the statute.

In reversing the Tenth Circuit, this Court stated:

> When we find the terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances. [citations omitted] We do not believe that this is one of those rare cases where the application of the statute as written will produce a result – "demonstrably at odds with the intentions of its drafters." . . . We cannot say that the payment of witness fees to prisoners is so bizarre that Congress "could not have intended" it.

Demarest v. Manspeaker, 498 U.S. at 190-191 (citations omitted).

In *Commissioner of Internal Revenue Service v. Asphalt Products Co., Inc.*, this Court granted certiorari to review the Sixth Circuit's construction of a tax statute. The statute at issue imposed a penalty of five percent on taxpayers who, through negligence or intentional disregard of tax rules or regulations, underpaid federal income taxes. In reversing the decision of the Court of Appeals limiting the amount of the negligence penalty based on its construction of the statute, this Court stated:

> Section 6653(a)(1) [tax statute at issue] could not be any clearer. If "any part of any underpayment" is due to negligence, the Commissioner shall add to the tax a penalty of "5 percent of the underpayment." It is impossible further to explain the statute

> without merely repeating its language . . . .

See 482 U.S. at 120.

Similarly, in this case, the plain language of the ICA cannot be any clearer. The ICA plainly and unambiguously provides that a "State is not accountable for interest earned on grant money pending its disbursement for program purposes." Despite its plain language, the Court of Appeals found Section 203(a) of the ICA to be ambiguous. Considering only selective portions of the legislative history of the ICA, the Court of Appeals concluded that the statutory phrase "pending its disbursement for program purposes" was intended to have a limited meaning because Congress "would have been shocked by the thought that a state could keep millions of dollars of interest on federal funds." *See* 13a.

The Court of Appeals' perception of what Congress intended and what the drafters of Section 203(a) *would have thought* about the application of the Act in this case is not a valid basis for re-writing the express language of the ICA. This Court has stated:

> Judicial perception that a particular result would be unreasonable may enter into the construction of ambiguous provisions, *but cannot justify disregard of what Congress has plainly and intentionally provided.* Given . . . the statute's explicit limitation of other penalties to the amount of the negligent or fraudulent underpayment, no conclusion can be drawn from the provision here at issue except that Congress desired to impose a modest penalty (5%) upon underpayments any part of which was attributable to negligence of the taxpayer. *It is not our assigned role to alter that disposition.*

See Commissioner of Internal Revenue Service v. Asphalt Products Co., Inc., 482 U.S. at 121 (emphasis added).

This Court must grant a writ of certiorari to correct the panel majority's conclusion which amounts to judicial legislation by re-writing the ICA in contravention of the express intent of Congress. The Court of Appeals' interpretation of the ICA fundamentally and retroactively alters the delicate balance of federal-state fiscal relationships.

There are twenty-six (26) states in addition to Pennsylvania with self-insurance reserve accounts similar to the accounts at issue in this case. *See* Commonwealth's Brief of Appellee at 24. Currently, there is at least one other case pending before the DAB where DHHS is demanding interest from the State of Alabama which DHHS claims it allegedly earned on federal grant funds held pending disbursement for program purposes. The Court of Appeals' interpretation of the ICA sets out a far reaching precedent which will be applicable to half the states in this country and millions of dollars in interest.

A. The Court Of Appeals' Interpretation Of The ICA Is Contrary To The Act's Plain Meaning.

The starting point in every case involving statutory construction is the language of the statute itself. *Southeastern Community College v. Davis*, 442 U.S. at 405 (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975)). *See also, Norfolk and Western Railway Co. v. American Train Dispatchers Assoc.*, 499 U.S. at __, 111 S.Ct. at __ , 113 L. Ed. 2d at 106-110; *Commissioner of Internal Revenue Service v. Asphalt Products Co., Inc.*, 482 U.S. at 120-121. This is because there is "no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) (citing *United States v. American Trucking Association, Inc.*, 310 U.S. 534 (1940)).

In resolving disputes over the meaning of a statute, this Court has held that:

> The task of resolving the dispute over the meaning of [a statute] begins where all such inquiries must begin: with the language of the statute itself. [citation omitted]. In this case it is also where the inquiry should end, for where, as here, the statute's language is plain, "the sole function of the courts is to enforce it according to its terms."

United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470 (1919)).

In *Griffin v. Oceanic Contractors, Inc.*, this Court reviewed the application of a wage penalty statute to a seaman who was injured while working on a vessel operated by the respondent. The petitioner seaman brought an action against the respondent for damages and penalty wages for the respondent's failure to pay over earned wages due him upon his discharge. The wage penalty statute at issue imposed a penalty upon an owner of a vessel who refused or neglected to pay a seaman his wages.

The respondent argued that a literal construction of the wage penalty statute would produce an absurd and unjust result which Congress could not have intended.

> Petitioner would receive over $300,000 simply because respondent improperly withheld $412.50 in wages. In respondent's view, Congress could not have intended seamen to receive windfalls of this nature without regard to the equities of the case.

> It is true that interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available. [citations omitted]. In refusing to nullify statutes, however hard or unexpected the particular effect, this Court has stated:
>
> > "Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts." [citation omitted].
>
> * * *
>
> It is enough that Congress intended that the language it enacted would be applied as we have applied it. The remedy for any dissatisfaction with the results in particular cases lies with Congress and not with this Court. Congress may amend the statute; we may not.

Griffin v. Oceanic Contractors, Inc., 458 U.S. at 574-576.

In this case, the Court of Appeals similarly concluded that Congress could not have intended that the states receive the benefit of interest earned on federal funds pending their disbursement for program purposes. The Court of Appeals' perception of what Congress intended when drafting the ICA cannot justify disregard for the plain and unambiguous language expressly provided by Congress.

Additionally, this Court and the federal courts have repeatedly refused to re-write statutes enacted by the Congress and have consistently held that Congressional purpose is expressed by the *plain meaning* of the statutory language and that this language must be considered conclusive. *Norfolk and Western Railway Co. v. American Train Dispatchers Assoc., supra; United States v. Ron Pair Enterprises, Inc., supra; American Tobacco Co. v. Patterson,* 456 U.S. 63, 68 (1982); *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 477 U.S. 102, 108 (1980). To alter Congress' clear language, there must be "extraordinarily clear evidence of a contrary legislative intent." *Malloy v. Eichler*, 860 F.2d 1179, 1183 (3d Cir. 1988). Moreover, where the language of the statute is clear, only "the most extraordinary showing of contrary intentions" justifies altering the plain meaning of the statute. *Malloy v. Eichler,* 860 F.2d at 1183 (citing *Garcia v. United States*, 469 U.S. 70 (1984)). Here, the legislative history is extraordinarily clear that states are *not* to be charged interest *pending* disbursement of federal funds.

The plain meaning of the ICA clearly provides that states are not responsible for interest earned on the federal grant funds *pending disbursement* for program purposes:

> Consistent with program purposes and regulations of the Secretary of the Treasury, the head of an executive agency carrying out a grant program shall schedule the transfer of grant money to minimize the time elapsing between transfer of the money from the Treasury and the disbursement by a State, whether disbursement occurs before or after the transfer. *A State is not accountable for interest earned on grant money pending its disbursement for program purposes.*

See 31 U.S.C. § 6503(a) (emphasis added).

As the panel majority of the Third Circuit, the dissent, and the district court all agreed, these self-insurance reserve funds are grant funds being held pending disbursement to claimants for program purposes. Notwithstanding the plain and unambiguous language of the ICA, the panel majority opinion decides to re-write Congressionally created legislation by inserting the word "immediate" or "prompt" into the statute so that the last sentence would read "pending their *immediate* disbursement for program purposes."[1] (*See* 12a-13a).

The Third Circuit's decision and erroneous interpretation of the ICA is based on an alternative argument offered by the Commonwealth to demonstrate that any way the ICA is interpreted, the Commonwealth is not accountable for interest on federal funds pending their disbursement for program purposes. The Commonwealth argued in the alternative that the funds at issue were disbursed when deposited into the self-insurance reserves and, therefore, lost their federal grant character at that time. Accordingly, there was no need to reach the statute, since there was no interest earned on "federal" funds. The district court did not reach (or implicitly rejected) this argument, since it found the ICA

1. DHHS repeatedly argued that Congress did not mean what it said in the ICA, despite Congressional notice, comment and debate on the floor during enactment, recodification and amendment over the course of twenty years, which specifically focused on the instant issue of state accountability for interest. *See* Memorandum of Law in support of the Commonwealth's Motion for Summary Judgment at pages 17-22 for the legislative history of the Act. Instead, DHHS asserts that the DAB actually better "*understood* the *context* in which the ICA was *intended* to apply." Brief for Appellants at p. 18 (emphasis added). *See also* Brief for Appellants at p. 7 ("Congress . . . did not contemplate"); p. 8 ("as that term was meant"); p. 19 ("whatever other abuses had to be tolerated" presumably because of the express words of Congress). Once again, neither DHHS nor the Court of Appeals have the authority to veto the Congress.

expressly relieved the Commonwealth from earning interest while the grant money was being held pending disbursement for program purposes.

The majority mischaracterized this alternative argument as a different "plausible interpretation of the pertinent statutory language" (*see* 9a) and used this as an excuse to look behind the statutory language at legislative history. As noted by the dissent, the majority's conclusion is illogical and counterintuitive (*see* 19a).

In the first instance, the Commonwealth's alternative argument was not an "interpretation" of the statutory provision, but an argument why factually the court need not even reach the statutory interpretation issue. The district court either did not reach this argument or implicitly rejected it.[2] Thus, there is no basis for going beyond the express unambiguous language of Congress.

Secondly, and as Judge Becker's dissent points out, even if the Commonwealth's alternative argument were a "plausible statutory interpretation" different from that of the district court, under either "interpretation" the Commonwealth *is not accountable for interest* (*see* 19a). No one, including the panel majority, offered a plausible "interpretation" in which the Commonwealth was accountable for interest. Indeed, Congress' words are incapable of such an interpretation. The majority only reached its result by judicial legislation inserting the word "prompt" into Congress' language when Congress intentionally chose not to do so.

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2. Judge Becker's dissent concluded that the district court rejected this factual argument and that the funds in the self-insurance reserves were held "pending disbursement," and thus the ICA applied.

B. Even If The ICA Were Ambiguous, Which It Is Not, The Court Of Appeals Erred By Misinterpreting The Legislative History Of The ICA.

Even if one looked to the legislative history, the majority's conclusion that Congress did not intend what it expressly said is insupportable. The majority opinion relies heavily on the legislative history of the ICA as it was debated in the House of Representatives. The House version of the ICA deleted the provision which relieved the states from accountability for interest earned on grant money pending its disbursement.

As the majority noted, the House initially deleted this provision from the bill, but the Senate retained it, and the Senate provision was accepted by the Conference Committee (H.R. Conf. Rep. No. 1934, 90th Cong., 2d Sess. 12, reprinted in 1968 U.S.C.C.A.N. 4248) and enacted. The Senate version of the ICA was enacted *after* the "[T]he Comptroller General . . . (House Report at 29, 1968 U.S.C.C.A.N. at 4247) and the Department of Health, Education and Welfare (House Report at 18, 1968 U.S.C.C.A.N. at 4238) objected to the provision relieving the states from accountability for interest." (*See* 12a). Yet, as the majority concedes, every single citation to legislative history on which it relies for its "legislative intent" argument is from the House, which had originally adopted the *rejected* version of Section 203(a).

The Senate version of the ICA, however, retained this provision. It was the *Senate* version that was adopted by the Conference Committee. The Conference Committee's decision to enact the Senate version of the ICA was made *after* the Controller General and the Department of Health, Education and Welfare specifically objected to the provision relieving states from accountability for interest.

Despite legislative history which clearly confirms Congress' intent expressed in unambiguous statutory language to relieve the states from the accounting for interest earned on federal grants was deliberate and well considered, the majority instead relies on selective commentary from the House version of the ICA, a version which was never enacted by Congress. Rather than follow the clear intent of Congress, the majority's decision re-writes the ICA and judicially legislates where Congress has acted. Accordingly, the majority's opinion is based on an erroneous interpretation of the relevant legislative history which it has used to re-write the plain language as expressed by Congress.

CONCLUSION

For all of the foregoing reasons, this Court must grant a writ of certiorari to correct the Court of Appeals' error of law and judicial legislation which has effectively re-written the express statutory language of Congress. The Court of Appeals' decision will also adversely affect twenty-six other states with self-insurance reserves. DHHS is currently attempting to impute interest to some states, in violation of the express language of the ICA and the intent of Congress, in the same manner it imputed interest against the Commonwealth of Pennsylvania. Petitioner therefore respectfully urges this Court to address the foregoing issues and grant its Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JUNE 11, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-7373

COMMONWEALTH OF PENNSYLVANIA OFFICE OF THE BUDGET,

Appellee

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES; ALMA R. JACOBS, Regional Director, Region III, Department of Health and Human Services,

Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 91-00471)

Present: Becker, Alito, and Garth, *Circuit Judges*

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued on January 20, 1993.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered May 19, 1992, be, and the same is hereby reversed and the

cause remanded to the district court for further proceedings consistent with this Court's opinion. Costs taxed against appellee. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ P. Douglas Side
Clerk
Dated: June 11, 1993

Costs taxed in favor of Department of Health and Human Services, Alma R. Jacobs, Regional Director, Region III, HHS as follows:

Total for Brief	$.....	44.80
Total for Appendix	.....	53.40
Total for Reply Brief	.....	39.20
Total	$.....	137.40

Certified as a true copy and issued in lieu
of a formal mandate on July 19, 1993.

Teste: s/ P. Douglas Side

Clerk, U.S. Court of Appeals for the Third Circuit.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED JUNE 11, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-7373

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF THE BUDGET

Appellee

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES;
ALMA R. JACOBS, Regional Director, Region III,
Department of Health and Human Services,

Appellants

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE MIDDLE DISTRICT OF
PENNSYLVANIA

(D.C. Civil No. 91-00471)

Argued: January 20, 1993

Before: BECKER, ALITO, and GARTH, *Circuit Judges*

(Opinion Filed: June 11, 1993)

Appendix B

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OPINION OF THE COURT

ALITO, *Circuit Judge*:

The Commonwealth of Pennsylvania Office of the Budget ("the Commonwealth") began this action to establish that it is not accountable for interest earned on federal grant funds that were placed in self-insurance accounts used to pay workers' compensation and health benefit claims by state employees who administer federally funded programs. The district court entered summary judgment for the Commonwealth, holding that the Commonwealth is entitled to keep such interest under Section 203(a) of the Intergovernmental Cooperation Act of 1968, 31 U.S.C. § 6503(a) (1988) (amended 1990) [hereinafter "Section

203(a)"]. We conclude that the district court's interpretation of Section 203(a) was incorrect, and we therefore reverse.

I.

The federal government provides funding for a variety of welfare benefit programs that are administered by the states. Under these programs, the federal government furnishes money that the states then distribute to program recipients. In addition, the federal government reimburses the states for a portion of their administrative expenses. Among these administrative expenses are the costs of benefits, such as workers' compensation and medical benefits, for state employees who work on the programs.

Rather than purchasing insurance to cover workers' compensation and health benefit claims, the Commonwealth has chosen to be "self-insuring," that is, it has chosen to pay these costs out of special accounts created within its General Fund. The Commonwealth periodically transfers money into these accounts in order to maintain reserves that are sufficient, based on actuarial calculations, to cover expected future obligations. The Commonwealth assesses the federal government for a proportionate share of the money transferred into these accounts.

When the Director of the Division of Costs Allocation of the federal Department of Health and Human Services audited the Commonwealth's records for fiscal years 1986 through 1989, he discovered that the Commonwealth had failed to credit the federal government with its share of the interest that the Commonwealth had earned on the money in these accounts. He therefore concluded that this interest had to be refunded to the federal government.[1]

After an unsuccessful request for reconsideration by HHS's Regional Director for Region III, the Commonwealth appealed the determinations regarding fiscal years 1988 and 1989 to the HHS Departmental Appeals Board ("DAB"), contending that no interest had been earned on the federal

1. HHS contends that the interest on the federal monies for fiscal years 1986 through 1989 totals more than $7.5 million.

portion of the self-insurance accounts and that, in any event, the Commonwealth was entitled to keep any such interest by virtue of Section 203(a) of the ICA. This provision stated:

> Consistent with program purposes and regulations of the Secretary of the Treasury, the head of an executive agency carrying out a grant program shall schedule the transfer of grant money to minimize the time elapsing between transfer of the money from the Treasury and the disbursement by a State, whether disbursement occurs before or after the transfer. A State is not accountable for interest earned on grant money pending its disbursement for program purposes.

The DAB found that interest had in fact been earned, and it rejected the Commonwealth's Section 203(a) argument, concluding that "the self-insurance accounts were not grant funds held 'pending disbursement' within the meaning of Section 203." DAB Op. at 10, App. at 17. In enacting Section 203, the DAB wrote, "Congress was convinced that any interest earned on most grant funds between their transfer and their disbursement would be so minimal that it would not be worth the effort to account for the interest." *Id.* at 9, App. at 16. By contrast, the DAB observed, "[t]he self-insurance funds are, in essence, contingency funds to be tapped, or disbursed, only when claims are filed against them and paid by the State." *Id.* Noting that large amounts of interest had been earned on the federal contributions alone, the DAB found it "doubtful that Congress intended the ICA to be the vehicle for such a large amount of federally generated interest to be transferred to the State." *Id.* The DAB therefore upheld the determination that the Commonwealth was required to refund the interest earned on the federally contributed funds.

The Commonwealth then began this action in the United States District Court for the Middle District of Pennsylvania, seeking a declaratory judgment that it was not required to refund the interest, as well as an injunction prohibiting the Department of Health and Human Services and its Regional Director (hereinafter "HHS") from

recapturing such interest. The district court subsequently granted summary judgment for the Commonwealth, holding that the Commonwealth was entitled under Section 203(a) to keep the interest. The district court refused to defer to HHS's interpretation of Section 203(a) on the ground that HHS is not responsible for enforcing that provision. Exercising plenary review, the court then opined that the language of Section 203(a) is unambiguous and is thus dispositive. The court concluded that funds held in the Commonwealth's self-insurance accounts were plainly held "pending disbursement for program purposes" – i.e., pending their use to pay employee claims – and that accordingly the Commonwealth was not accountable for interest earned on those funds.

Observing that "only the 'most extraordinary showing of contrary [legislative] intentions' " could justify disregarding the plain meaning of a statute, Dist. Ct. Op. at 15, App. at 77 (quoting *Malloy v. Eichler*, 860 F.2d 1179, 1183 (3d Cir. 1988)), the court found the legislative history of Section 203(a) insufficient to meet that burden. The court wrote:

> We recognize, and the legislative history reveals, that Congress designed the ICA to minimize the time between transfer and disbursement in order to eliminate the states' ability to profit from investing federal funds. However, while Congress may have had an *expectation* that a shorter time between transfer and disbursement would result in less interest being accumulated by the states, the idea that states should disburse funds promptly was not intended as a *prerequisite* to their right to retain interest. We agree that the House, Senate or committees voiced a concern to prevent states from obtaining windfalls, and section 203(a) was enacted to help alleviate this concern. However, the fact that Congress has not required "immediate disbursement" or placed a cap on the interest which may be earned, indicates that the statute may be applied to all situations involving the receipt of funds pending disbursements, although there may be occasions when states receive more than a de minimis amount of interest.

Id. at 16-17, App. at 78-79 (emphasis in original) (footnote omitted).

The court also found support for its decision in an HHS regulation (45 C.F.R. § 74.47(b)) and in recent legislative and administrative developments. The court noted that after the fiscal years in question in this case, Congress enacted an amendment of Section 203(a), 31 U.S.C. § 6503, that generally requires states, effective October 24, 1992, to pay interest to the United States on federal funds held in state accounts. The court further noted that in 1988 the Office of Management and Budget had proposed a revision of a prior notice (OMB A-87, 46 Fed. Reg. 9548 (1981)) that would have expressly prevented states from retaining interest on federal funds kept in self-insurance accounts. Apparently viewing these events as evidence that the states had previously been permitted to retain such interest, the court wrote that "[t]hese developments serve to bolster our decision that existing law does not preclude plaintiff from retaining the interest in question." Dist. Ct. Op. at 18, App. at 80. Finally, the court held that HHS had "abused [its] discretion by applying a new policy which render[ed] the plaintiff accountable for actions taken in good-faith reliance upon the ICA, OMB A-87, and the Department's own regulations." *Id.* at 19-20, App. at 81-82. The court therefore granted summary judgment in favor of the Commonwealth and remanded the case to HHS "for entry of a decision that pursuant to 31 U.S.C. § 6503(a) plaintiff is entitled to retain the interest at issue in this proceeding." Dist. Ct. Order, App. at 84.

HHS then took this appeal.

II.

A. At the outset, the parties dispute whether the district court erred in refusing to defer under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to HHS's interpretation of Section 203(a). HHS argues that deference is appropriate because the President delegated to OMB the responsibility for prescribing rules and regulations implementing the ICA (Exec. Order 12,372,

47 Fed. Reg. 30,959 (1982)) and because OMB, in turn, designated HHS as the agency responsible for developing instructions for grantees. OMB A-87, Attachment A, J.3. The Commonwealth responds that this "chain of attenuated delegations" (Appellee Br. at 37) is insufficient to justify deference.

We do not find it necessary to resolve this dispute, particularly since the version of Section 203(a) at issue has now been amended. Even without deferring to HHS's interpretation, we are convinced that the district court's interpretation of Section 203(a) was incorrect.

B. The district court's decision rests primarily on the conclusion that the plain language of Section 203(a) unambiguously supports the Commonwealth's position. When statutory language is unambiguous, we must of course heed it except in those "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). *See also, e.g., Public Citizen v. United States Department of Justice*, 491 U.S. 440, 454 (1989); *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 509-10 (1989). But, unlike the district court, we think that Section 203(a) is "not a provision in which Congress' limpid prose puts an end to all dispute." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 57 (1987). Indeed, the district court and the Commonwealth — both of whom fervently maintain that Section 203(a) is unambiguous and both of whom conclude that the Commonwealth is entitled to keep the interest — have provided a striking demonstration of the ambiguity of Section 203(a) by proffering two entirely different but nevertheless plausible interpretations of the pertinent statutory language.

The district court had no doubt that the key statutory phrase — "pending ... disbursement [of federal grant money] for program purposes" — referred to the time period during which federal monies were kept in the self-insurance

funds prior to disbursement to claimants. This interpretation of the statutory language, however, is not without problems, for if it were correct, it would seem questionable whether Section 203(a) would permit federal agencies to make contributions to self-insurance funds at all. As noted, the first sentence of Section 203(a) says that federal departments and agencies must schedule the transfer of funds "so as to minimize the time elapsing between the transfer of the money from the Treasury and the disbursement by a State." However, the very nature of self-insurance funds – in which monies remain on deposit for lengthy periods – seems inconsistent with such minimization.

Perhaps in recognition of this problem, the Commonwealth asserts that the statutory language unambiguously supports a completely different interpretation. According to the Commonwealth, disbursement occurs when the federal money is initially placed in the reserve accounts, not when claims are paid from those accounts.

In the face of these conflicting interpretations, we could hold that the statutory language is unambiguous only by concluding that either the district court's or the Commonwealth's interpretation is unreasonable. *Cf. New Castle County v. Hartford Accident & Indemnity Co.*, 933 F.2d 1162, 1198 (3d Cir. 1991) (contract term is ambiguous when capable of two reasonable interpretations); *Mellon Bank, N.A. v. Aetna Business Credit, Inc.*, 619 F.2d 1001, 1011 (3d Cir. 1980) (same). This we cannot do. Looking only at the statutory language, we believe that both interpretations are reasonable, and thus it is apparent that the statutory language is ambiguous. Consequently, it is appropriate to look beyond the statutory language and consider the background, purpose, and legislative history of Section 203(a). *Green*, 490 U.S. at 511; *Dixon v. United States*, 465 U.S. 482, 491 (1984).

C. Before Section 203 was enacted in 1968, it had long been established in decisions of the Comptroller General that interest earned by a grantee on funds advanced by the

United States belonged to the United States rather than the grantee and had to be refunded unless special authorization was provided. *See, e.g.*, 42 Comp. Gen. 1289 (1962); 1 Comp. Gen. 652 (1922); *see also* 64 Comp. Gen. 96 (1984); 59 Comp. Gen. 218 (1980). By 1968, however, an "'extraordinary expansion in the dollar amounts and number of grants-in-aid'" had produced "'serious management difficulties.'" H.R. Rep. No. 1845, 90th Cong., 2d Sess. 9 (1968), reprinted in 1968 U.S.C.C.A.N. 4220, 4229 (quoting Advisory Commission) [hereinafter "House Report"]. The ICA was intended to correct some of these problems and alleviate the administrative burdens on the states.

One of these burdens was the need to account for interest earned on federal funds, and Section 203(a) was meant to eliminate this burden while at the same time preventing the states from obtaining a windfall by holding federal funds for lengthy periods and earning substantial amounts of interest prior to disbursement. The Senate Report stated that Section 203 would "minimize the time between the Treasury transfer and the disbursement by the State." S. Rep. No. 1456, 90th Cong., 2d Sess. 15 (1968). "It is further intended," the Senate Report continued, "that States will not draw grant funds in advance of program needs." *Id.* The Report explained that "new techniques, such as the letter of credit and sight draft procedures now used by Treasury, should minimize the amount of grants advanced, and thus it should not be necessary to continue to hold States accountable for interest or other income earned prior to disbursement." *Id.*

In a similar vein, the House Report stated that "Federal funds will be retained by the U.S. Treasury until actually needed by the State for the payment of obligations incurred under the particular grant program." House Report at 5, 1968 U.S.C.C.A.N. at 4225. On the floor of the House, Representative Fascell explained (114 Cong. Rec. 26,986 (1968)):

Section 203 establishes a procedure designed to

> discourage the advancement of Federal grant-in-aid funds for longer time periods than are necessary.... Effective Government-wide implementation of this mechanism should save the Federal Government considerable amounts of interest costs.

See also 114 Cong. Rec. 26,979 (1968) (statement of Rep. Erlenborn) ("To prevent States from gaining an unfair advantage through earning interest on federal funds so deposited, such funds shall be transferred to States so as to minimize the timelapse between transfer and disbursement.").

The Comptroller General (House Report at 29, 1968 U.S.C.C.A.N. at 4247) and the Department of Health, Education, and Welfare (House Report at 18, 1968 U.S.C.C.A.N. at 4238) objected to the provision relieving the states from accountability for interest. The Secretary of HEW stated that this provision "might be an incentive to States to draw the funds sooner than actually needed, contrary to the objective of Section 203." House Report at 29, 1968 U.S.C.C.A.N. at 4247. The House initially deleted this provision from the bill, but the Senate retained it, and the provision was accepted by the Conference Committee (H.R. Conf. Rep. No. 1934, 90th Cong., 2d Sess. 12, reprinted in 1968 U.S.C.C.A.N. 4248, 4249) and enacted, presumably based on the House's belief that the scheduling of transfers would mean that "the amount of such interest in the future should be rather small." House Report at 9, 1968 U.S.C.C.A.N. at 4229.

D. In light of this background, we are convinced that the statutory phrase "pending its disbursement for program purposes" was intended to have a specific and limited meaning. This phrase was intended to refer to the period during which a state temporarily holds federal grant-in-aid money that is destined for prompt transfer to the ultimate recipients of program benefits. The phrase was clearly not intended to refer to the long-term holding of federal funds in reserve accounts. On the contrary, it seems clear that the congressional committees and the supporters of Section

203(a) would have been shocked by the thought that a state could keep millions of dollars of interest on federal funds placed in such accounts. Congress thought that Section 203(a) would prevent states from holding federal funds for any appreciable period of time. It intended to "save the Federal Government considerable amounts of interest costs" (114 Cong. Rec. 26,986), not to give the states a huge interest windfall.

As we have noted, before Section 203(a) was enacted, it was a well-established rule that recipients of federal grants were required to return any interest earned on such grants prior to their use unless they were specifically authorized to keep it. When Congress enacted Section 203(a), it wanted to modify this rule regarding interest on federal grants, but it most assuredly did not intend to sanction what the Commonwealth tried to do in this case. Statutes that modify settled rules should "'be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.'" *United States v. Texas*, 61 U.S.L.W. 4307, 4308 (April 5, 1993) (holding that statute did not abrogate the long-established rule that states must pay prejudgment interest on debts to the federal government) (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952)). Thus, we are reluctant in this case to interpret Section 203(a) as abrogating the prior, established rule to a far greater extent than Congress intended.

In sum, we are convinced that the statutory phrase "pending . . . disbursement for program purposes" was not intended to refer to the long period of time during which federal funds are kept in self-insurance accounts such as those maintained by the Commonwealth. Entitlement to interest earned on those accounts, therefore, is governed by the rule, which predates the enactment of Section 203(a), that holders of federal grant money are required, absent specific authorization, to refund any interest earned on that money to the federal government.

Appendix B

III.

The remaining arguments advanced by the Commonwealth and the district court do not require lengthy discussion. Both the Commonwealth and the district court suggest that a regulation promulgated by HHS to implement Section 203(a) (45 C.F.R. 74.47(b)) supports the Commonwealth's entitlement to the interest in dispute. We disagree. Whether or not HHS's interpretation of Section 203(a) itself is entitled to deference, we must certainly defer to HHS's interpretation of its own regulations. *See Immigration and Naturalization Service v. National Center for Immigrants' Rights, Inc.*, 60 U.S.L.W. 4052, 4054 (1991); *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965). Moreover, it is quite clear that this regulation was simply intended to incorporate the rule contained in Section 203(a) and was not intended to give the states an even greater exemption from accountability for interest earned on federal grant funds.[2]

We likewise see no merit in the Commonwealth's argument that "the legislative history of the [1990 amendment of Section 203] provides indisputable evidence that under *current* law, states are not accountable for interest earned on federal funds pending disbursement for program purposes until *commencing* October 24, 1992."

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2. 45 C.F.R. § 74.47(b) provides in pertinent part (emphasis added):

> *In accordance with the Intergovernmental Cooperation Act of 1968* (Pub. L. 90-577), States . . . shall not be accountable to the Federal Government for interest or investment income . . . where this income is attributable to grants-in-aid. . . .

Thus, the language of this subsection alone makes it clear that HHS merely intended to incorporate the rule contained in the ICA. Moreover, subsection (a) of the same provision states that "[e]xcept when exempted by federal statute (see paragraph (b) of this section for the principal exemption), grantees shall remit to the Federal Government any interest or other investment income earned on advances of HHS grant funds." 45 C.F.R. § 74.47(a).

Appellee Br. at 24. In the first place, "subsequent legislative history is a 'hazardous basis for inferring the intent of an earlier' Congress." *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)). Moreover, the only provision of the legislative history of the 1990 enactment cited by the Commonwealth merely restates the general rule regarding accountability for interest contained in Section 203(a). This portion of the legislative history says nothing whatsoever concerning accountability for interest earned on self-insurance accounts or any other accounts similar to those at issue here.[3]

For similar reasons, we see no significance for present purposes in OMB's 1988 proposal to modify OMB A-87 to prevent states from retaining interest earned on self-insurance accounts. We see no indication that this proposal was anything more than an effort to obviate future difficulties. We certainly see no indication that it represented a concession by the federal government that states were entitled to retain such interest under the existing law.[4]

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3. The Commonwealth relies on the following statement in the 1990 House Report:

> Under the current law, the States need not account to the Federal Government for interest earned on Federal funds disbursed to the States prior to payment to program beneficiaries.

H.R. Rep. No. 696, 101st Cong., 2d. Sess. 5 (1990), reprinted in 1990 U.S.C.C.A.N. 1691, 1691-1692.

4. The Commonwealth's reliance on three other actions taken by OMB is likewise misplaced. First, the fact that OMB has allowed the states to place federal money in self-insurance reserves (OMB A-87, Attachment B, C.4.c.) does not show that OMB meant to allow states to keep the interest earned on federal funds placed in such accounts. Second, the fact that another section of the same OMB notice does not specifically list interest earned on such accounts as an item that must be

(Cont'd)

Appendix B

We also reject the Commonwealth's argument that HHS, by seeking to recover interest earned on self-insurance accounts, in effect amended OMB A-87 in violation of the Administrative Procedure Act's rulemaking procedures. HHS simply sought to enforce by adjudication the Commonwealth's obligation to return interest owed the federal government in accordance with a long-established rule. The rulemaking provisions of the APA are therefore totally inapplicable.

Finally, we do not reach the Commonwealth's argument that in fact no interest was earned on the self-insurance accounts in question. As previously noted, the DAB explored and rejected this argument. The district court, however, did not explicitly address this point. Consequently, we do not address this question in the present appeal. If the Commonwealth chooses to press this contention on remand, the district court will be free to address it.

The district court's order will be reversed, and the case will be remanded for further proceedings consistent with this opinion.

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reimbursed is not significant. The list contained in this provision is, by its terms, not exhaustive. *See id.*, Attachment A, C.1.g. Third, we see no significance for present purposes in a memorandum issued by an OMB officer to federal agencies in 1986 urging them to refrain from "all independent interest initiatives" pending enactment of the 1990 legislation. Contrary to the Commonwealth's contention, we cannot read this memorandum as an "affirmation by the Executive Branch" that states are not accountable for interest earned on self-insurance funds.

Appendix B

Becker, J., dissenting.

Section 203(a) of the Intergovernmental Cooperation Act of 1963, 61 U.S.C. § 6503(a) (1988) [hereinafter "ICA"], accords the Commonwealth of Pennsylvania ("Commonwealth") the right to retain "interest earned on grant money pending its disbursement for program purposes." *Id.* In my view, the import of this language is clear, and neither the majority nor the Department of Health and Human Services ("HHS") has offered a compelling argument that the federal funds in question do not meet the "pending disbursement" or "program purposes" requirements of the ICA. Because I believe the statute's interest repayment exemption applies to the facts of this case, I would hold that the Commonwealth is entitled to retain the interest earned on the federal grant money used in its self-insurance reserves.[1]

I.

Stated in full, § 203(a) of the ICA provides:

Consistent with program purposes and regulations of

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1. Like the majority, I do not reach the interesting question raised by the parties – whether we owe deference, under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984), to HHS's interpretation of the ICA when Congress did not delegate the authority to implement this statute directly to HHS, but rather to the Treasury Department. Through an executive order, *see* Exec. Order No. 12,372, 47 Fed. Reg. 30,959 (1982), the President has delegated the authority to implement and administer the ICA to the Office of Management and Budget ("OMB"), which, in turn, has delegated authority to HHS for "developing and issuing the instructions for use by grantees in preparation of cost allocation plans." OMB A-87, Fed. Reg. 9548, 9551 (Jan. 28, 1981 [hereinafter "OMB A-87"]. I need not address this *Chevron* question because, in my view, the language of the ICA is clear and on-point, and it is well-established that courts must follow the language of the statute itself rather than a contrary agency interpretation when the statute speaks directly and unambiguously on an issue. *See Chevron*, 467 U.S. at 842-43, 104 S. Ct. at 2781-82; *see also Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 453-54, 107 S. Ct. 1207, 1224-25 (1987) (Scalia, J., concurring).

> the Secretary of the Treasury, the head of an executive agency carrying out a grant program shall schedule the transfer of grant money to minimize the time elapsing between transfer of the money from the Treasury and the disbursement by a State, whether disbursement occurs before or after the transfer. *A State is not accountable for interest earned on grant money pending its disbursement for program purposes.*

31 U.S.C. § 6503(a) (1988) (amended in 1990) (emphasis added). In the instant case, there was, admittedly, a particularly long time between the point at which the Commonwealth "drew down" the money from the federal government to place in its self-insurance reserves and the point at which the Commonwealth disbursed the money to cover insurance claims. That, however, does not change the fact that the federal funds, while they were within the Commonwealth's self-insurance reserve accounts prior to their use to satisfy insurance claims, were "pending . . . disbursement for program purposes." I agree with the district court that the disbursement of the money occurred when the Commonwealth applied it for its ultimate purpose, the reimbursement of insurance claims. The period before this act occurred was therefore "pending . . . disbursement."

The majority acknowledges that this interpretation of § 203(a) is plausible, but concludes that this provision is ambiguous because the Commonwealth has asserted an alternative interpretation which the Majority deems equally plausible. *See* Majority Typescript at 8. Specifically, the Commonwealth submits that under § 203(a) the federal funds were disbursed at the point at which the Commonwealth received them from the federal government, not (as the district court concluded) at the time when the Commonwealth used the federal funds to satisfy insurance claims. According to the Commonwealth, therefore, once the relevant funds were deposited within its self-insurance reserve accounts, the federal government lost all claims on the funds, as they were then entirely the property of the Commonwealth. Based on this logic, the Commonwealth

then claims entitlement to any interest earned, as it was interest earned on its own money.

Accepting the majority's contention that both the Commonwealth's and the district court's views are plausible – though as just discussed I adhere to the view of the district court – the conclusion the majority reaches is counterintuitive. While crediting the interpretations of the Commonwealth and the district court, *both* of which result in the conclusion that the *Commonwealth* is entitled to retain the interest, the majority nonetheless determines that the *federal government* retains the interest. The majority reaches this surprising result because, having identified a conflict between the interpretations of the district court and the Commonwealth over an arguably ambiguous clause within § 203(a), it then turns to the legislative history, not so much to aid its interpretation of the clause in question, but to supplant the terms of § 203(a) in its entirety, including language that is clear and unambiguous.

Even if the ambiguous meaning of "pending ... disbursement" may justify the majority's decision to look to the legislative history to interpret that phrase (despite the fact that both approaches giving rise to the ambiguity lead to the same result in favor of the Commonwealth), it does not license the majority to use the legislative history to reconstrue the statute as a whole. Even though there may be two equally plausible interpretations of "pending ... disbursement" as applied to this case, the majority ignores what the statute does make clear: a state does not have to refund the interest on federal funds under either the district court's or the Commonwealth's interpretations.

Moreover, in my view, the Commonwealth has easily met the second requirement of § 203(a), that the federal funds be used for "program purposes." It is undisputed that HHS has approved Pennsylvania's use of federal money for self-insurance reserves,[2] a practice which saved money for both

2. OMB A-87 also contemplates the use of federal funds for self- (Cont'd)

the Commonwealth and the federal government. Although HHS has correctly pointed out that the interest on the federal funds, when it was diverted into the Commonwealth's general revenue accounts, was not put to use for program purposes, this fact is irrelevant under § 203(a). Section 203(a) requires that the federal grant *money*, not the *interest* it generates, must be used toward the goals of the federal-state cooperative program.[3]

II.

In order to avoid the application of the plain language of § 203(a), the majority, as I have noted, resorts to the legislative history of the ICA, which it then uses to effectively re-write the statute. It is well-established that, ordinarily, legislative history does "not trump the facial meaning of [a] statute," because if "the language of the statute is clear, only the most extraordinary showing of contrary intentions justifies[] altering the plain meaning of a statute." *American Lung Ass'n of N.J. v. Kean*, 871 F.2d 319, 325 (3d Cir. 1989) (citations and internal quotations omitted); *accord Garcia v. United States*, 469 U.S. 70, 75, 105 S. Ct. 479, 482 (1984); *TVA v. Hill*, 437 U.S. 153, 187 n.33, 98 S. Ct. 2279, 2298 n.33 (1978); *Malloy v. Eichler*, 860 F.2d 1179, 1183 (3d Cir. 1988). I do not believe that the majority has made the "extraordinary showing" of contrary legislative intent necessary to warrant its disregard of § 203(a)'s explicit language.

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insurance reserves. *See* 46 Fed. Reg. at 9554 ("Contributions to a reserve for a self-insurance program approved by the Federal grantor agency are allowable.").

3. In addition, as the Commonwealth points out, HHS did not raise the argument that the federal funds did not comply with the program purposes requirement of § 203(a) before the district court. It is therefore waived.

Appendix B

The majority correctly points out, *see* Majority Typescript at 8, that the general, background purpose of the ICA as a whole was to "improve the administration of grants-in-aid to the States" in order to alleviate the management problems created by the vast increase in number and size of federal grants to the states. H.R. Conf. Rep. No. 1934, 90th Cong., 2d Sess. 1 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4248. In addition, as the majority explains, § 203(a)'s drafters believed that the period of time between a state's receipt of federal funds and its disbursal of those funds should be minimized. *See* Majority Typescript at 9 (citing S. Rep. No. 1456, 90th Cong., 2d Sess. 15 (1968). Apparently based on the assumption that there would be a short lag time between a state's draw-down of the funds and their disbursal, the drafters of § 203(a) exempted the states from the burden of accounting for and repaying the federal government for interest earned on federal funds thereby relieving them of a previous administrative and fiscal burden. *See* S. Rep. No. 1456, 90th Cong., 2d Sess. 15 (1968). Although allowing the Commonwealth to retain the interest in this case may call into question the wisdom of the drafters' apparent assumption that there would be a minimal period between federal and state disbursal, that assumption, by itself, cannot override the explicit provisions the drafters included in the ICA itself.

Indeed, it seems clear to me that despite this assumption, the drafters of § 203(a) were willing to place the burden of minimizing the pre-disbursal time period on the relevant federal agency, not on the states. Congress, in enacting § 203(a), changed the pre-existing rule that state-grantees were accountable for the interest on federal funds. *See* 42 Comp. Gen 289 (1962). The drafters of § 203(a) could have either retained the pre-existing rule or at least retained it in those situations in which states would receive federal funds for a considerable period before their disbursement. However, Congress chose not to do so.

The legislative history makes clear that Congress' decision to free the states from the burden of accounting for

interest earned on federal grants was not inadvertent, but deliberate and well-considered. Both the Comptroller General, *see* H.R. Rep. No. 1845, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. at 4247, and the Secretary of the Department of Housing, Education and Welfare, *see id.* at 4238, informed Congress of their objections to § 203(a)'s elimination of the states' duty to account for interest on federal grants. The House of Representatives deleted the provision, while the Senate retained it. At the joint House-Senate conference, the current version of § 203(a) was adopted, exempting states from accountability for interest. The legislative history reveals, therefore, that Congress quite deliberately relieved the states from their liability for interest, while imposing on federal agencies the duty of minimizing the time during which the states would retain federal money before using it.[4]

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4. I reach my conclusion as to the meaning of § 203(a) without resort to Congress' recent amendment of the ICA because of the "difficulties inherent in relying upon subsequent legislative history." *Sullivan v. Finkelstein*, 496 U.S. 617, 110 S. Ct. 2658, 2665 n.8 (1990) (citing *United States v. United Mine Workers of Am.*, 330 U.S. 258, 281-82, 67 S. Ct. 677, 690 (1947)). However, I note that the subsequent legislative developments support my interpretation. Specifically, in 1990 Congress amended the ICA to authorize regulations imposing upon the states the duty of refunding the interest earned on federal grants prior to their disbursal. *See* P.L. No. 101-453, 104 Stat. 1058 (1990) (codified at 31 U.S.C.A. § 6503(c)(1) *et seq.* (West Supp. 1993)). The House report accompanying the amendments to the ICA commented:

> Currently, the Intergovernmental Cooperation Act permits a State to retain for its own purposes any interest earned on Federal grant funds transferred to the States 'pending its disbursement for program purposes.' Thus, where a State draws down Federal funds in advance of payment to program beneficiaries, the State may invest the funds to earn income for the use of the State.

H.R. Rep. No. 101-696, 101st Cong., 2d Sess. 5 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1691, 1693. This interpretation of the unamended version of the ICA as well Congress' decision to amend the ICA in order to reach the result the majority reaches – requiring states to return pre-disbursal interest – comports with my conclusion that the ICA, before its 1990 amendments, allowed states to retain such interest.

III.

Rather than follow Congress' decision to relieve the states from refunding the interest on undisbursed federal funds, the majority relies on the rule which existed prior to the enactment of the ICA, that all federal grantees must refund any interest earned on federal grants prior to their disbursal, absent specific authorization to the contrary. To do so, the majority invokes the "presumption favoring the retention of long-established and familiar principles." *United States v. Texas* 61 U.S.L.W. 4307, 4308 (1993) (citing *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783, 72 S. Ct. 1011, 1014 (1952)). Yet this presumption in favor of the retention of a pre-existing common law rule does not apply when Congress has legislated on the issue, " 'speak[ing] directly' to the question addressed by the common law." *Id.* In the situation at hand, Congress was aware of the old rule that grantees were responsible for the interest on federal money and, through § 203(a), specifically acted to eliminate that rule. Simply put, Congress has directly spoken to the common law rule, and has abrogated it with respect to state grantees. For this reason, adherence to the pre-existing common law rule rather than the statutory rule which replaced it is, in my view, improper.

IV.

In sum, I would follow the language of § 203(a) of the ICA, which I consider clear. I do not believe the legislative history so clearly evinces a contrary intention as to justify a failure to follow the statute's plain language. At best, the legislative history reveals an assumption by the drafters as to the length of time during which states would retain federal funds. The fact that this assumption has not always proven correct, however, cannot overcome the plain language of § 203(a). Applying § 203(a)'s terms to the facts at hand, I would hold that the federal funds were pending disbursement after being deposited in the Commonwealth's self-insurance reserves and prior to being used to satisfy insurance claims. In addition, the Commonwealth, by using

the federal funds to supplement its self-insurance reserves, was using the federal money for a program purpose. I therefore would hold that the Commonwealth is entitled to retain the interest earned on the federal funds, hence I respectfully dissent.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX C — ORDER AND JUDGMENT, AND MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA FILED MAY 18, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:CV-91-471

COMMONWEALTH OF PENNSYLVANIA OFFICE OF THE BUDGET,

Plaintiff

vs.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ALMA R. JACOBS, Regional Director, Region III, HHS

Defendants

ORDER AND JUDGMENT

AND NOW, this 18th day of May, 1992, upon consideration of the parties' cross-motions for summary judgment, it is ordered as follows:

1. Defendants' motion for summary judgment is denied.

2. Plaintiff's motion for summary judgment is granted.

3. Judgment is hereby entered in favor of plaintiff and against defendants.

4. This action is remanded to the Department of Health and Human Services for entry of a decision that pursuant to 31 U.S.C. § 6503(a) plaintiff is entitled to retain the interest at issue in this proceeding.

5. The Clerk of Court shall close this file.

s/ William W. Caldwell
William W. Caldwell
United States District Judge

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:CV-91-471

COMMONWEALTH OF PENNSYLVANIA OFFICE OF THE BUDGET,

Plaintiff

vs.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ALMA R. JACOBS, Regional Director, Region III, HHS

Defendants

MEMORANDUM

I. *Introduction.*

Pending are the cross motions for summary judgment filed by plaintiff, Commonwealth of Pennsylvania, Office of the Budget, and defendants, United States Department of Health and Human Services (the Department) and Alma R. Jacobs, Regional Director of the Department. Plaintiff instituted this declaratory judgment action to vacate the decision of the Department Appeals Board, which required plaintiff to refund to the federal government interest earned on federal funds advanced for grant-in-aid purposes. We will examine the motions under the well-settled standard. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Appendix C

II. *Background*

In the early 1980's, plaintiff created three self-insurance reserve accounts to cover the costs of worker's compensation awards and health and hospital benefits for all state employees. The reserves paid claims directly and the state was uninsured for worker's compensation purposes. Plaintiff sought funds from the federal government to fund part of benefits to be paid to employees who were involved in federally and jointly funded programs. To determine the annual outlays necessary to sustain its self-insurance fund, plaintiff computed a per employee "rate of contribution" based upon a percentage of payroll dollars which it estimated would cover the cost of anticipated claims and insure a reasonable balance for the subsequent year.

The Department was responsible for reviewing and approving these rates for the federal government. For the years 1983 through 1989, it approved the contribution rates suggested by plaintiff for its three self-insurance accounts. In each of those years, the Department issued "letters of credit"[1] to plaintiff authorizing advances of amounts necessary to cover the federal government's share of the contribution rates as they were applied to the employee payrolls. Within a reasonable time, plaintiff would withdraw these amounts from the U.S. Treasury, deposit them into its general treasury, and provide benefits to employees whenever claims arose. Thus, the funds received were not immediately disbursed and were retained until needed.[2]

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1. A "letter of credit" is defined under the Department's regulations as "an instrument certified by an authorized official [of the grantor agency] which . . . [permits] a recipient to draw funds needed for immediate disbursement." 45 C.F.R. § 74.91.

2. Although plaintiff did not segregate the federal funds in its general treasury, (Cont'd)

Appendix C

During the years in question, plaintiff routinely invested portions of the self-insurance reserves, including the federal funds, in various interest bearing securities. These investments resulted in increased revenues which plaintiff neither reinvested in the self-insurance account, nor refunded to the federal government. In September of 1986, the federal Office of Inspector General (OIG) reviewed plaintiff's fund balances and found that it had failed to credit the federal government with a proportionate share of the interest earned on those accounts. The OIG concluded that this interest income constituted an "applicable credit" under regulation A-87 of the Office of Management and Budget (OMB), and therefore should have been deducted from plaintiff's "allowable costs" and refunded to the federal government.[3]

The Director of the Division of Cost Allocation for the Department (DCA) performed subsequent audits of plaintiff's records for the fiscal years 1986 through 1989 using the cost principles applied earlier. The DCA found that plaintiff again had failed to credit the federal government with its share of interest earned. Plaintiff filed for reconsideration of the DCA determination for fiscal years 1988 and 1989, contending that the Department failed to show that plaintiff actually earned interest on its self-insurance funds. Moreover plaintiff argues that any such interest is an allowable cost which would have been paid to a private insurance carrier (were the state not self insured) and is not refundable to the federal government.

Defendant, Alma R. Jacobs, a Regional Director of the

(Cont'd)
it maintained ledgers accounting for balances and transactions attributable to each self-insurance account.

3. Plaintiff has never appealed the Inspector General's conclusions.

Department, rejected plaintiff's arguments and upheld the DCA director's determinations. Upon appeal to the Department Appeals Board (the Board), plaintiff argued that it was not accountable for interest earned on its self-insurance funds pursuant to § 203(a) of the Intergovernmental Cooperation Act (ICA), 42 U.S.C. § 4213 (repealed and codified at 31 U.S.C. § 6503 (a)), which provides as follows:

> [T]he head of an executive agency carrying out a grant program shall schedule the transfer of grant money to minimize the time elapsing between the transfer of the money from the Treasury and the disbursement by a State, whether disbursement occurs before or after the transfer. *A State shall not be held accountable for interest earned on grant money pending its disbursement for program purposes.*

31 U.S.C. § 6503(a) (emphasis added).

The Board rejected plaintiff's argument, holding that the ICA's legislative history, the Board's prior determinations, and the cost principles of OMB A-87 indicate that the above exemption is a "narrow" one and is not applicable to the self-insurance reserve accounts in question. The Board held that section 203(a) of the ICA was intended to minimize the time between transfer and disbursement, and thus reduce the amount of interest states would be able to earn. The Board reasoned that the last sentence of 203(a) was added merely to relieve states of the administrative burden of having to refund what Congress expected to be only small amounts of interest, and was not designed to allow states to profit or receive a windfall from interest earned on federal funds.

Appendix C

In its motion for summary judgment, plaintiff argues that the language of section 203(a) is unambiguous and Congress' intent clear that states are not accountable for interest earned on federal funds pending disbursement for grant-in-aid purposes. The crux of the present matter is whether the "non-accountability provision" of 203(a) is applicable to self-insurance reserve accounts which do not involve immediate disbursement, but are contingent in nature (i.e. funds are disbursed only when needed to pay individual claims) and thus have a tendency to generate significant amounts of interest on an annual basis.

III. *Discussion*

A. *Standard of Review*

We preface our discussion with our standard of review. Generally, an administrative agency's interpretation of the statute it administers is entitled to deference and may only be overturned if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1982); *Citizens to Preserve Overton Park Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 823-24 (1971); *Camp v. Pitts*, 411 U.S. 138, 141-143, 93 S.Ct. 1241, 1244-45 (1973) (per curiam); *Applications Research v. Naval Air. Dev. Center*, 752 F. Supp. 660, 667 (E.D. Pa. 1990).

However, "an agency is not entitled to such deference when it interprets another agency's statute or resolves a conflict between its own statute and the statute of another agency." *Department of Navy, Military Sealift Command v. Federal Labor Relations Authority*, 836 F.2d 1409, 1410 (3d Cir. 1988); *Division of Military and Naval Affairs v. Federal Labor Relations Authority*, 683 F.2d 45, 48 (2d Cir. 1982) ("No great deference is due an agency

interpretation of another agency's statute"); *Whaley v. Schweiker*, 663 F.2d 871, 873 (9th Cir. 1981) (no judicial deference need be given to the Secretary of Health and Human Services' interpretation of another agency's statutes and regulations); *New Jersey Air Nat'l Guard v. Federal Labor Relations Authority*, 677 F.2d 276, 281 n. 6 (3d Cir. 1982); *Tsosie v. Califano*, 651 F.2d 719, 722 (10th Cir. 1981) ("[a] court should [only] accord substantial weight to the interpretation given a statue or regulation *by the agency charged with administering it*") (emphasis added). When the agency is not charged with administering the statute, "we are not bound by [the agency's] construction of th[e] statute *even if reasonable.*" *Nebraska, Military Dept., Office of Adjutant General v. Federal Labor Relations Authority*, 705 F.2d 945, 948 (8th Cir. 1983) (emphasis added).

The seminal case, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) is instructive. The Supreme Court stated the following:

> When a court reviews an agency's construction of the statute *which it administers*, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for *the court, as well as the agency, must give effect to the unambigously expressed intent of Congress*. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative

> interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. 467 U.S. at 843 (emphasis added).

In the present action, the Board's decision was based upon its interpretation of section 203(a) of the ICA, OMB A-87, and its own regulations. We agree that the Department is charged with the authority to administer cost-allocation programs for states according to the cost principles of OMB A-87, and is authorized to interpret its own regulations. However, the Department has failed to cite any authority which evidences that it is entrusted by Congress with the authority to interpret or administer the ICA, a congressional statute. For that reason, we will not accord the Department substantial deference in its construction of section 203(a) of the ICA, an interpretation which was central to the Board's decision.

Regardless, even if the Department were charged with the authority to interpret or administer the ICA, the Board's decision is not entitled to deference when it is contrary to the clear and unambiguous language of the statute. "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron, supra,* 467 U.S. at 843, n. 9. We "must reject administrative constructions of [a] statute, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement." *Federal Election Com. v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32, 102 S.Ct. 38, 42, 70 L.Ed.2d 23 (1981).

Appendix C

We will focus our inquiry first upon the statutory language at issue, and if section 203(a) is clear and unambiguous when applied to the specific issues at hand, we will look to the legislative history only as a guide to the statute's meaning. *See, United States v. Fernandez,* 749 F. Supp. 683 (E.D. Pa. 1990) (inquiry into history of statute is unnecessary when the language of statute is clear).

B. *The Plain Meaning of Section 203(a)*

The regulation and statute subject to interpretation in the present matter are OMB A-87 and section 203(a) of the ICA. First, plaintiff argues that the language of section 203(a) is unambiguous and clearly expresses Congress' intent that states are not required to pay interest on federal funds pending disbursement for grant-in-aid programs. Specifically, plaintiff avers that funds deposited in its self-insurance reserve accounts constitute "funds pending disbursement for program purposes." Construction of the language "pending disbursement" is critical to resolving the instant matter.

As indicated, section 203(a) provides: "A State shall not be held accountable for interest earned on grant money pending its disbursement for program purposes." 31 U.S.C. § 6503(a). Plaintiff contends that nothing in section 203(a) restricts the amount of interest states may retain or the length of time funds are "pending disbursement." Plaintiff argues that if Congress intended to restrict the language to mean "pending *immediate* disbursement," it would have so specified. Upon careful consideration, we find that section 203(a) is clear and unambiguous insofar as it entitles states to retain interest, regardless of the amount, so long as it is earned on federal funds advanced for program purposes, which would include the funds at issue. Defendants have failed to cite contrary authority specifically dealing with self-insurance reserve accounts.

Appendix C

Section 203(a) does not expressly limit the amount of interest states may earn or the period of time disbursement may be pending. Defendants argue that section 203(a) is merely a "narrow" exception to the general rule that "grantees shall remit to the Federal Government any interest or other investment income earned on advances of HHS grant funds." 45 C.F.R. § 74.47(a) (emphasis added); *see also*, 45 C.F.R. § 92.21(i). However, such "general rule" provides an explicit exception, i.e. "*[e]xcept when exempted by Federal statute,*" which clearly applies to section 203(a). *Id.*[4] In fact, the Department's own regulations specifically provide that:

> In accordance with the Intergovernmental Cooperation Act of 1968 (Pub. L. 90-577), States, as defined in the act, shall not be accountable to the Federal Government for interest or investment income earned by the State itself, or by its subgrantees, where this income is attributable to grants-in-aid as defined in the act (42 U.S.C. 4213).

45 C.F.R. § 74.47 (b). This language does not even limit the interest earned to a period pending disbursement.

The ICA permits states to receive federal grant-in-aid funds through letters of credit, which are instruments executed by the federal grantor agency "which authorize[] a recipient to draw funds needed for immediate disbursement." 45 C.F.R. § 74.91. Congress intended that the letter-of-credit procedure would reduce the period of time between transfer of funds and disbursement.

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4. The Department's construction of 45 C.F.R. § 74.47 (a) is misguided as the requirement to refund interest to the federal government is on grantees, not states.

Defendants argue, therefore, that section 203(a) and the letter of-credit procedure were intended to reduce the amount of interest states could earn prior to their disbursement of grant funds, and thereby prevent windfalls.[5]

On that ground, defendants contend that when federal funds transferred to the states are not *immediately* disbursed, "the interest on the remaining amounts is subject to the general accountability rule and is not excludable." They contend that section 203(a), therefore, does not apply to the self-insurance reserves at issue, because "due to their contingent nature, they roll over from year to year with large amounts of interest being generated in the interim and are not disbursed immediately." (Defendants's Supporting Brief, at 25). We reject this argument.

While we agree that the last sentence of section 203(a) was designed to ease the states' accounting burden, Congress clearly required that the federal government forego *all* interest earned on funds pending disbursement. Absent an exception with regard to the situation presented here, we may not interpret the statute in a manner that is contrary to its clear language.

Defendants rely upon the Board's interpretation of OMB A-87, which provides that states are entitled to reimbursement from

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5. To prevent the states from receiving windfalls, Congress initially required states to refund to the federal government any interest earned during the time between transfer and disbursement. *See*, H.R. Rep. No. 1845, 90th Cong., 2d Sess., *reprinted in* 3 U.S. Code & Cong. Admin. News, 90th Cong., 2d Sess. 4220, 4229 (1968)). Upon promulgation of the new letter-of-credit procedure, the Senate added the "non-accountability provision" of section 203(a) to relieve states of the burden of accounting for what was expected to be only small amounts of interest. However, the amount of interest that could be earned appeared to be contingent on the *federal government's* ability to minimize the time between transfer and disbursement, as required in the ICA.

the federal government for costs incurred in "federally- assisted programs," to the extent that such costs are "reasonable and necessary," OMB A-87, Attachment A, § C.1(a), but that "*no provision for profit or other increment above cost is intended.*" OMB A-87 ¶ 4 (emphasis added). Specifically, defendants argue that plaintiff inappropriately profited from its investment of federal funds, which resulted in a windfall for plaintiff that is contrary to the spirit and purpose of OMB A-87. Defendant contends that the interest in question must be deemed an "applicable credit" which must be refunded to the federal government or redeposited in the self-insurance reserve account program, but "interest" is not mentioned in OMB A-87. The Office of Management and Budget (OMB) was surely aware that interest could be earned on federal funds, but did not include it in the list of examples of applicable credits, perhaps because it would conflict with section 203(a) because the Act allows interest to be retained while credits must be returned to the government.[6] Moreover, the Department contends that the interest at issue is an applicable credit because had plaintiff redeposited the interest in the reserve accounts, the federal government would pay less the subsequent year, because the annual contribution rates are determined according to the year-end reserve account balance. This contention is unpersuasive as the same situation would arise for any amount of interest the states earn on funds pending disbursement, which they are entitled to retain pursuant to section 203(A) of the ICA.

Plaintiff further argues that had it contracted with a private insurance company for workers compensation coverage, the

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6. Even if the Department were charged by Congress with the authority to administer A-87 of the OMB, its interpretation of the applicable credit rule under A-87 is contrary to section 203(a) of the ICA, and thus, we need not accord its interpretation deference when it "resolves a conflict between its own statute and the statute of another agency." *Department of Navy, supra*, 836 F.2d at 1410.

government would have considered the funds disbursed and would not be entitled to claim the interest earned on such funds. Thus, by self-insuring itself plaintiff contends that it saves the government substantial costs. It argues it should not be required to refund interest which the government would not have realized in the former situation. Plaintiff refers to section C.4(c) of Attachment B to OMB A-87, which provides:

> Contributions to a reserve for a self-insurance program approved by the Federal grantor agency are allowable to the extent that the type of coverage, extent of coverage, and the rates and premiums would have been purchased to cover the risks.

See, 46 Fed. Reg. at 9554. We agree with defendant that its annual contribution rate is calculated according to the funds remaining in the reserves at the end of the year, which would apply also if a private carrier were used. Nevertheless, the above language indicates the OMB's awareness of the existence of self-insurance programs. The Department is charged with determining contribution rates according to the cost principles promulgated by the OMB, and the OMB recognizes self-insurance accounts. Yet no exception for such accounts has been enacted by it or by Congress in the twenty years of the ICA's existence. From this we conclude that Congress' intent in the Act is clear that reserve accounts are not to be distinguished from other funds pending disbursement.

C. *Legislative Intent*

Defendants contend that section 203(a) is ambiguous in its applicability to the specific issues in the present action, and therefore a review of the statute's legislative history is warranted.

However, although committee and House reports may be an indicator of legislative intent, they cannot, as a general rule, be used to replace the intent that is evident in the words of the statute. *Burlington N.R. Co. v. Oklahoma Tax Com.*, 481 U.S. 454, 107 S.Ct. 1855, 95 L.Ed.2d 404 (1987); *Malloy v. Eichler,* 860 F.2d 1179, 1183 (3d Cir. 1988) (only the "most extraordinary showing of contrary [legislative] intentions" justifies altering the plain meaning of a statute). Nevertheless, we will address the sources suggested by defendants as a guide to the statute's meaning.

Defendants argue that legislative history reveals a congressional intent that the non-accountability provision of section 203(a) is applicable only when funds are immediately disbursed, and that states may not profit by keeping federal funds in reserve accounts and retaining interest on them. First, defendants cite numerous Board decisions to support their argument that the interest earned by plaintiff in the present case was correctly treated as an applicable credit owed to the government. However, these decisions are distinguishable and apply to overpayment or similar situations where states were required to reimburse the *principal* advanced by the government, and naturally, any interest earned on the principal was also owed to the government. Defendants have failed to demonstrate that the funds advanced to plaintiff were owed to the federal government, and thus the Department's prior decisions, which held that interest constituted an applicable credit, are inapposite.

Second, defendant cites various House and Senate Reports, statements by committee members, and treatises regarding the intent behind the non-accountability provision of section 203(a).[7]

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7. *See*, H.R. Rep. No. 696, 101st Cong., 2d Sess., at 5 (1990) (the U.S. General Accounting Office "concluded that although the . . . [ICA] permitted a State to retain interest earned on Federal funds, 'it does not appear that Congress intended the law to

(Cont'd)

Appendix C

Defendants argue that Congress intended to reduce the amount of interest states may retain, and that the nonaccountability provision was added merely to ease the states' administrative burden to account for what was expected to be small amounts of interest. S. Rep. No. 1456, 90th Cong., 2d Sess. at 15 (1968) ("The new techniques, such as the letter of credit and sight draft procedures . . . should minimize the amount of grants advanced and thus it should not be necessary to continue to hold States accountable for interest or other income earned prior to disbursement").

We recognize, and the legislative history reveals, that Congress designed the ICA to minimize the time between transfer and disbursement in order to eliminate the states' ability to profit from investing federal funds. However, while Congress may have had an *expectation* that a shorter time between transfer and disbursement would result in less interest being accumulated by the states, the idea that states should disburse funds promptly was not intended as a *prerequisite* to their right to retain interest. We agree that the House, Senate or committees voiced a concern to prevent states from obtaining windfalls, and section 203(a) was enacted to help alleviate this concern. However, the fact that Congress has not required "immediate disbursement" or placed a cap on the interest which may be earned, indicates that the statute

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(Cont'd)

result in large financial benefits to the States"); *see also*, *Board of Education of Township H.S. Dist. No. 205 v. Illinois State Bd. of Educ.*, 1989 LEXIS 10711 (N.D. Ill. September 8, 1989) (the legislative history behind the ICA "evinces a congressional concern with the states gaining an unfair advantage through earning interest on federal funds"); *Principles of Federal Appropriations Law* at 13-41 (1st ed. 1982) ("The theory behind the ICA was to control the release of grant funds and thereby preclude situations from arising in which State *grantees* would be in a position to earn excessive interest on grant advances . . . The statutory exception was not intended to create a windfall for State *grantees*").

may be applied to all situations involving the receipt of funds pending disbursements, although there may be occasions when states receive more than a de minimis amount of interest.[8] Thus, the fact that plaintiff may have earned more interest than the Department would expect does not preclude the applicability of section 203(a) to plaintiff's situation.

Finally, Congress amended the ICA, and promulgated the Cash Management Improvement Act of 1990 (CMIA), 31 U.S.C. § 6503, which becomes effective October 24, 1992. The CMIA will require that states in certain instances refund to the federal government interest earned on advanced funds. Further, the OMB has proposed a revision to OMB A-87, which has yet to be promulgated, that deals specifically with the issue at hand and would require that states return interest earned on reserve funds. *See* 53 Fed. Reg. 40352, October 14, 1988; 53 Fed. Reg. at 40360, Attachment B, § 23c(2). These developments serve to bolster our decision that existing law does not preclude plaintiff from retaining the interest in question.

C. *Informal Adjudication*

Pursuant to the Administrative Procedures Act (APA), 5 U.S.C. § 551(4), an agency action is delineated as either "rulemaking" or "adjudicatory." Plaintiff contends that the Board

8. Section 203(a) was not created to be applied in an ad hoc discretionary fashion, applicable only when small amounts of interest are earned, but not when larger amounts are earned. Despite Congress' expectation that interest earned would be minimal, that Congress did not specify an exception to 203(a) for funds not promptly disbursed, funds kept in reserve accounts, or funds which generate significant amounts of interest, indicates that the statute was intended to have general application.

abused its discretion by employing adjudication to effectuate a new policy which is contrary to existing law and is generally applicable to at least twenty-six states which operate federally funded self-insurance reserve accounts. Plaintiff argues that because the new policy will govern widespread future conduct it should have been effectuated through rulemaking, rather than adjudication.[9] Plaintiff further avers that the Board lacked authority to administer a change in section 203(a) because the statute was clear on its face, and the Board is not charged by Congress with the power to interpret or administer the statute.

We recognize that an administrative agency is "not precluded from announcing new principles in an adjudicative proceeding and [] the choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion." *N.L.R.B. v. Bell Aerospace Co. Div. of Textron Inc.*, 416 U.S. 267, 294, 94 S.Ct. 1757, 1771 (1974), *overruled on other grounds, N.L.R.B. v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 102 S.Ct. 216, 70 L.Ed.2d 323 (1981). *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 202-203, 67 S.Ct. 1575, 1581, 91 L. Ed. 1995 (1947) ("the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency"); *International Union, United Mine Workers v. Federal Mine Safety and Health Admin.*, 920 F.2d 960, 964 (D.C. Cir. 1990) (agencies are afforded substantial discretion in choosing between rulemaking and adudication).[10] However, we agree with plaintiff that, as indicated,

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9. Defendants concede that the Board rendered its decision by informal adjudication.

10. However, such discretion appears to apply only when the agency is charged with the duty and power to promulgate the new standard, and we have decided the Board in the present action is not so empowered.

the Department may only be accorded discretion when it is entrusted by Congress with the authority to render an adjudication interpreting a congressional statute, and we have decided that the Department has no such authority.

Regardless, we find that defendants abused their discretion by applying a new policy which renders the plaintiff accountable for actions taken in a good-faith reliance upon the ICA, OMB A-87, and the Department's own regulations. This is particularly so when the precise issue of interest earned on self-insurance reserves is the subject of proposed legislation enacted by the Department, and is included in the CMIA, which is not yet effective. Because as the Department has no authority to interpret section 203(a), and since the statute is clear and unambiguous on its face, it acted improperly in enacting a new policy. Even if the Department were entrusted by Congress to interpret section 203(a), it abused its discretion in creating an exception which is contrary to the statute and to the clear intent of Congress.

IV. *Conclusion*

We conclude that the Board's decision requiring plaintiff to refund to the federal government interest earned on its federally funded self-insurance reserves cannot be sustained. Accordingly, we will remand the case to the Department for the entry of a decision that plaintiff is entitled to retain the interest in question.

An appropriate order will issue.

s/ William W. Caldwell
William W. Caldwell
United States District Judge

Date: May 18, 1992

APPENDIX D — SUR PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JULY 9, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-7373

COMMONWEALTH OF PENNSYLVANIA, OFFICE OF BUDGET,

Appellees

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ALMA R. JACOBS, REGIONAL DIRECTOR, REGION III, DHHS,

Appellants

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS and GARTH,* *Circuit Judges*

The petition for rehearing filed by appellee in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

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* Senior Judge Garth as to panel rehearing only.

Appendix D

By the Court,
s/ illegible
Circuit Judge

DATED: JUL 09 1993